United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-1231

To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1231

UNITED STATES OF AMERICA,

Appellee,

—against—

MILTON NUSSEN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,

GARY A. WOODFIELD,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

This is an appeal from a judgment of conviction, entered on June 20, 1975, by the United States District Court for the Eastern District of New York, following a jury trial (Platt, J.), convicting the appellant, Milton Nussen, of conspiring to possess and distribute phentermine, a controlled substance, in violation of Title 21, United States Code, Section 846.[1] Appellant was sentenced pursuant to the Youth Corrections Act (18, U.S.C. § 5010 (b)) to an indeterminate period of confinement not to exceed four years. He is free on bail pending the determination of the appeal.

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[1] Appellant was acquitted of two counts of a violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

The sole issue raised by this appeal is that the district court erred in admitting into evidence portions of a confession by appellant made after he had allegedly been "promised" that these statements would not be used against him. The statements, in which appellant admitted *inter alia* that he had planned to obtain a witness to support a phony alibi, were admitted after an alibi witness testified for appellant.

Statement of Facts

1. In July 1974, John Di Gravio, Special Agent of the Drug Enforcement Administration working in an undercover capacity, negotiated with Mark Risucci for the sale of approximately 11,000 tablets of phentermine for $2,500. Thereafter, Risucci contacted Jerome Rudish who in turn contacted appellant Milton Nussen, a close friend, whom Rudish knew had access to large quantities of amphetamines. Rudish advised appellant of Risucci's name and telephone number and his desire to purchase a large quantity of amphetamines. Appellant, however, reluctant to meet anyone new, pursuaded Rudish to handle the illicit transaction himself. Appellant told Rudish that he would leave the pills in appellant's car which he would park in a parking lot and that Rudish would remove the pills from the car. Rudish agreed to this and arrangements were made for the transaction (107, 128, 40, 41).[2]

On July 16, 1974, Di Gravio, with Risucci, proceeded from Long Island to a shopping center parking lot at Rockaway Parkway and Seaview Avenue in Brooklyn (128, 131). At approximately 9:00 P.M., Risucci telephoned Rudish (who testified at the trial) and advised him of their arrival (132, 133). This information was then related to appellant at his place of employment,

[2] Unless otherwise indicated the page references are to the trial transcript.

Podolsky Reality. Appellant obtained the 11,000 tablets of phentermine from a refrigerator in his house and proceeded to the parking lot in a 1970 Plymouth (44-49). Appellant, who was undetected by either Di Gravio or his fellow agents in surveillance at this parking lot, parked his car and then departed on foot (48, 49). Shortly thereafter pursuant to appellant's instructions, Rudish arrived and met with Risucci and Di Gravio (49). Rudish and Di Gravio then proceeded to appellant's parked automobile where Rudish delivered the phentermine to Di Gravio who remarked as to its coldness (43, 50). In response to Di Gravio's comment on the method of using an additional car for the transaction, Rudish replied that this was a big operation, in fact, someone was observing them at that very time. Upon the completion of this transaction, Risucci and Rudish were arrested at approximately 9:20 P.M. A search of both Rudish and appellant's 1970 Plymouth failed to discover keys for that automobile. However, this search resulted in the discovery of an additional 100 tablets of phentermine secreted in appellant's car (220-221).

Shortly after the arrest of Risucci and Rudish in the shopping center parking lot, appellant who observed the arrests, proceeded to the 63rd Precinct of the New York City Police Department where he filed a complaint falsely reporting his car stolen (Ex. 6A, 179-182). In this report made at 10:00 P.M., appellant stated that his car was stolen at Avenue I between E. 58 and Flatlands at 5:30 PM, earlier that day (Ex. 6A, 207-209).[3]

A few days after his arrest, Rudish was approached by appellant who inquired of Rudish if he had revealed appellant's involvement in the illicit transaction and whether the agents had discovered an additional 100 pills secreted in his automobile (51, 54). Rudish told appellant that

[3] Podolsky Reality, where appellant worked, is located at this address.

he had not told the agents about him and that he did not know about the additional 100 pills (53, 54, 104). Thereafter, appellant again met with Rudish at which time Rudish told appellant that he was going to plead guilty and cooperate. Appellant then told Rudish that he understood and that he would obtain an alibi witness who would falsely state that he was working on the evening of July 16, 1974 (53, 54).

2. Rudish pled guilty on November 1, 1974, and agreed to cooperate. On December 12, 1974, Rudish testified before the grand jury which returned the instant indictment.[4] On December 17, 1974, Special Agents Di Gravio and Falvey arrested appellant (143). After having been advised of his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 464 (1968), and acknowledging that he understood them, appellant was transported to the Drug Enforcement Administration office for processing (143-146). During this processing, after again being advised of his rights, Di Gravio, Falvey and appellant entered into a conversation (147, 148). In response to Di Gravio's question concerning why he reported his car stolen, appellant stated that he had panicked when he saw Rudish arrested on July 16, 1974, and filed the stolen car complaint to establish a false alibi (148, 226, 227). When asked if he wished to call to advise his employer that he would be late, appellant stated that he had previously discussed with his employer the possibility of his arrest (146, 148, 227).

During this conversation appellant stated that he wished to cooperate. Agent Di Gravio then explained to appellant that their interest in this continuing narcotics investigation was the identification and prosecution of the source of the phentermine tablets (147, 225, 226). Although willing to cooperate appellant expressed a concern

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[4] On November 1, 1974, Riscucci also pled guilty.

that the agents would use the information he would supply them for further prosecution of him (299, 334). Agent Di Cravio assured appellant that they were not interested in any further prosecutions against him, but were interested in pursuing the investigation (299, 300, 311, 312, 333). As an expression of this agreement agent Di Gravio shook hands with appellant (300, 311, 333). Thereafter, in the continuing conversation with the agents, appellant again stated that he was in the parking lot on July 16, 1974 and had observed Rudish's arrest (302, 334). Appellant further stated that he had obtained the 11,000 pills from one Jimmy Abrams and that another transaction with him could be arranged (300, 303, 334). Appellant also admitted at that time that he had considered obtaining a female who would testify falsely that appellant was with her when the transaction took place. The agents advised appellant to contact them in a few days to continue the investigation (335). Appellant never contacted them and trial commenced on April 9, 1975.

3. Although appellant's counsel [5] was fully advised prior to trial of the various statements made by appellant at the time of his arrest, no motion to suppress these statements was made. Nevertheless, prior to the introduction of any of appellant's statements, the United States advised the district court of its intention not to use in its direct case appellant's admissions made after he shook hands with agent Di Gravio (121-124).

At the close of the case-in-chief, appellant proceeded to put in an alibi defense. One Thomas Romanelli testified that on July 16, 1974, when the transaction here at issue took place, continuously from 8:00 P.M. until 9:30 P.M., he and appellant (a real estate salesman) were together viewing two houses for his possible purchase

[5] Appellant was initially represented by Louis R. Rosenthal. At trial, Philip Peltz assisted Mr. Rosenthal, and on June 5, 1975, prior to sentencing, he was substituted as appellant's counsel.

(244-248). On cross examination, Romanelli stated that he was first contacted by appellant and Mr. Peltz concerning the activities of July 16, 1974, on the evening prior to the commencement of the trial, April 8, 1975 (277, 278). Mr. Romanelli was told by appellant that appellant was in trouble because he had lent his automobile to "his good friend" (283), and his friend got caught with diet pills (282). Although these events occurred almost ten months earlier, Mr. Romanelli said he recollected that he had been with appellant on the night of July 16, 1974, because July 14, 1974, the preceding Sunday, was his birthday and he recalled calling Mr. Nussen on the following day for an appointment on July 16, 1974 to look at a house. When subsequently confronted with a certified copy of his birth certificate showing his date of birth as July 17, 1920, Mr. Romanelli stated that the date on the certificate was inaccurate and was due to a mistake of a midwife. Accordingly he always celebrated his birthday on July 14 (329).

Mr. Romanelli was the only defense witness. The appellant did not take the stand, although defense counsel advised the jury that his client would testify (21); he never explained how his car came to be in the parking lot at Rockaway Parkway and Seaview Avenue in Brooklyn at July 16, 1975 with 11,000 tablets of phentermine in the back seat. Moreover, there was no explanation of his statement to Mr. Romanelli on the eve of trial, that he had lent the car to "his good friend" (Rudish) and his report filed on July 16, 1974 after the seizure of the vehicle, that it had been stolen.

Prior to summations, the United States was permitted to re-open its case to introduce evidence to impeach Thomas Romanelli and to introduce the statements made by appellant at the time of his arrest after he shook hands with Agent DiGravio. These additional statements included an admission that besides the false stolen car report, appellant considered having a false alibi witness

to cover his whereabouts on the evening of July 16. Moreover, also admitted at this time was appellant's admission that the source of the supply of the pills was one Jimmy Abrams (300, 303, 334).

A hearing was held prior to the introduction of these additional statements outside of the presence of the jury (297-323). At this hearing, Agent DiGravio testified concerning appellants agreement to cooperate and their conversation about use of this additional information against him (333):

> After the statement made by Mr. Nussen, during the process of Mr. Nussen, it was agreed that Special Agent John Falvey and myself would attempt to initiate an investigation on the status of the 11,000 stimulant tablets.
>
> At this time, Mr. Nussen questioned the fact of whether what he said at this time would be used against him to further develop a more encompassing case involving any drug dealings, and other transactions he had engaged in previous or subsequent to July 16, 1974. Mr. Nussen and I shook hands at this time. I informed him that what he said would not be used against him. That we were at this time attempting to further the case in order to reach the source of supply of the 11,000 stimulant tablets. That I was not interested in developing a tighter case on Mr. Nussen.

During the hearing, Judge Platt put the following question to Agent DiGravio (319):

> When you said, as I believe you said on cross-examination at one point that the statements that he made, the further statements that he made were not going to be used against him. Was that made in the context "not going to be used against him" in this case or "not going to be used against him" in building a larger case as you heretofore indicated?

Agent DiGravio responded as follows (319-320):

> The context was made that what he said would not be used against him to develop an entire case or a larger case. It would not be used to drag in other narcotic transactions or other types of incidents that had occurred.
>
> What we needed from him was assurances that he in fact could help us to further this case to get to the source of supply.

The district court found that the additional admissions made after the "agreement" were admissible (324). Subsequently, in denying appellant's motion for a new trial, Judge Platt further explicated on his findings as follows (Tr. [June 20, 1975] at pg. 4):

> Now, as I read that and as I read the surrounding parts of that testimony what Mr. De Graffio [sic] was saying was that he made no promise that he would not be prosecuted or that anything he said would not be used in connection wtih the case as to which they already had him, so to speak, but that they wouldn't use anything he said to add to that case against him in terms of building or adding additional counts in the indictment that they already envisaged [sic] and indeed they didn't, they only charged him with just one violation and they used—and try warned him not once but twice.

In short, the district court found that the introduction of appellant's statement to rebut his defense did not violate the undertanding that appellant had with Agent DiGravio.[6]

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[6] Appellant did not take the stand at the hearing to contradict the testimony or to indicate what his state of mind was with respect to the agreement as to the use of his testimony.

ARGUMENT

A. Introduction

Appellant's claim that the post-agreement statements he made were "involuntary" and not properly admissible is predicated upon the assumption that the agreement precluded the use of any statement he thereafter made at a trial arising out of his conduct on July 16, 1974. Moreover, assuming that the agreement is so construed, appellant argues that it must be enforced even where he put in a defense at the trial which flies in the face of the admissions he made.

The first impediment to appellant's claim is Judge Platt's finding of fact that the "agreement" contemplated only that the statements thereafter made would not be used to support criminal charges not arising out of appellant's involvement in the distribution of illicit drugs on July 16, 1974. While we acknowledge that it may be a close question, we do not believe that Judge Platt's finding is clearly erroneous. At the time that the agreement with Agent DiGravio was entered into, appellant had already effectively admitted his complicity in the events which took place on July 16, 1974; he already admitted being present in the parking lot and observing the arrest of his accomplice and of filing the false claim regarding the theft of his automobile in order to cover his acknowledged involvement. Having thus implicated himself in the transaction for which he was arrested, it seems obvious that his concern regarding any additional admissions, particularly the disclosure of his source of supply for the illicit drugs, would be with respect to additional charges which would be brought against him. Moreover, it is significant that appellant never testified at the hearing to suggest that his understanding of the agreement was other than what Judge Platt found it to be. Since he could have so testified without fear that any statements he made would be

used to incriminate him (*Simmons* v. *United States*, 390 U.S. 377 (1968)), his silence is particularly significant in determining whether it has been established that the agreement did not contemplate the effect which appellant now urges it be accorded.

This consideration aside, it is our submission that even if the agreement be construed, as the appellant would have it, it should not be enforced to the extent of permitting the defendant to put in a defense which is wholly inconsistent with the otherwise voluntary statements appellant made to the law enforcement officers. It is one thing to say that, in fairness, the United States should be held to the promises made by its agents regarding the use of statements he made where the defendant acts in good faith; it is quite another to read the agreement as affording the defendant the right to put in a defense which is wholly contradicted by his voluntary statements. We proceed now to a discussion of this issue. Moreover, we shall also show that any error in the admission of this evidence is harmless and does not require reversal of the judgment of conviction.

B. The Post-Agreement Admissions were Admissible to Permit the Jury to Determine the Credibility of Appellant's Alibi Defense

The appellant argues that the statements he made after entering into the agreement were "coerced and involuntary in that they were extracted under a promise of use immunity." Accordingly he argues such statements were inadmissible at trial. While we would be prepared to challenge his characterization of those post-arrest statements as "coerced and involuntary", since in fact they were voluntarily made without the use of any compulsion on the defendant to speak, we need not quibble over this issue because we agree that it would offend the Due Process Clause for the Untied States to use a state-

ment against a defendant which was induced by a promise that it would not be used against him. See *Santobello* v. *New York*, 404 U.S. 457 (1971).[7]

We submit, however, that the United States lived up to its promise by not offering any of the admissions against the defendant in its case-in-chief. What the appellant is arguing is that the promise that was made to him was intended to apply, or should be construed to apply, to permit him to put in a defense wholly inconsistent with the statements he made without fear that the jury will hear that he had earlier admitted his intention to fabricate an alibi defense. We believe that this construction of the agreement is unsound and should be rejected.

Since we doubt whether either the defendant or the D.E.A. agents contemplated whether the agreement would apply in the circumstances here, the issue whether the agreement should be so construed or enforced is essentially one which should be resolved on the basis of considerations of policy regarding the proper administration of justice.

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[7] We recognize that in *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 347-48 (1963) the Supreme Court indicated that evidence of guilt induced under a promise of immunity "must be excluded under the Self-Incrimination Clause of the Fifth Amendment." This language, which its author later characterized as dictum (*Miranda* v. *Arizona*, 384 U.S. 464, 506 dissenting opinion of Harlan, *J.* (1966), is difficult to reconcile with the holding that "a necessary element of compulsory self-incrimination is some kind of compulsion." *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966). Cf. *United States* v. *Ferrara*, 377 F.2d 16, 17 (2d Cir.), *certiorari denied*, 389 U.S. 908 (1967). The defendant here was not compelled to speak in any sense of the word; his incriminating statements "were not the product of any sort of coercion, legal or factual" *United States* v. *Hoffa*, *supra*, 385 U.S. 304. They were wholly voluntary and were not induced by the threat of contempt (see *Kastigar* v. *United States*, 406 U.S. 441 [1972]) or "factual" coercion.

We believe that the holdings of the Supreme Court in analogous situations, and the considerations which have been found to be controlling there, compel the result which we urge here, to wit, that the agreement should not be construed "to include the right to commit perjury" or put in a fabricated defense. Cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971).

We begin by noting the general rule that, even where evidence has been obtained in a manner which violates the Constitution "[i]t is one thing to say that the Government cannot make affirmative use of [such] evidence * * *. [i]t is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against the contradiction of his own mistruths." *Walder* v. *United States*, 347 U.S. 62, 65 (1954). This principle has been applied not only in cases where evidence has been obtained in violation of the Fourth Amendment, as in *Walder* v. *United States*, *supra*, but to cases in which evidence has been obtained in a manner which is deemed to be presumptively coercive and violative of the Self-Incrimination Clause. So for example, although custodial interrogation has been found to be presumptively coercive (*Hoffa* v. *United States*, 385 U.S. 293, 304 [1966]), yet statements obtained in violation of the mandate of *Miranda* have been held to be admissible to impeach the credibility of the defendant. *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975). The basic consideration, as Mr. Justice Blackman observed in *Oregon* v. *Hass*, *supra*, 420 U.S. 722 is that "[w]e are, after all always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." Accord: *United States* v. *Kahan*, 415 U.S. 239, 243 (1974).

The holdings in these cases are even more apposite here, for here the manner in which the evidence was obtained was not in any way objectionable. Here the *taking* of the statement did not violate the Constitution; there was no coercion, no torture, no failure to follow a procedure mandated by the Supreme Court, no illegal search and seizure. The admission of the disputed evidence here will not undermine the deterrent effect of any exclusionary rule. If then it is to be excluded, it must be because its admission into evidence is somehow constitutionally offensive. And that boils down to whether the agreement should be construed to permit the defendant to put in a defense wholly inconsistent with the statements he made. At the very least, absent an explicit understanding of parties that the use immunity extended this far, the strong countervailing considerations of policy reflected in the Walder-Harris-Hass line of cases, compel the rejection of appellant's claim.[8]

We, of course, recognize that in one respect the result we urge here appears to go beyond the holdings in those cases; for there the defendants had taken the stand, and the disputed evidence was used merely to impeach his credibility. Here the defendant did not take the stand; instead he put on an alibi witness and the defendant's statements were admitted to rebut the defense. We

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[8] Appellant claims that *Harris* v. *New York, supra,* is distinguishable because there appellant made "no claim that the statements made to the police were coerced or involuntary" (401 U.S. at 224). But the Supreme Court there was obviously referring to a claim of actual coercion which not only renders the reliability of the admission suspect, but involves conduct which should so clearly be deterred that any diminution of the deterrent effect of the exclusionary rule should not be tolerated. Here, of course, appellant cannot allege that his statement was the product of actual coercion. Rather at most the claim is that his statement should be treated as if it were.

do not believe that this is a significant distinction. We do not understand why in terms of the policies reflected by those cases the credibility of an alibi witness should be any more immune than the testimony of the defendant from challenge by highly relevant and probative evidence. The defendant is obviously vouching for the credibility of the witness and is urging the jury to accept that testimony. Indeed, in his summation appellant's counsel told the jury that Mr. Romanelli testified "honestly" (360). Moreover, he continued (360):

> "I ask you to say that Mr. Romanelli is to be admired as coming here as a public spirited citizen to tell the truth."

Certainly, if the defendant has made admissions which cast doubt on the credibility of that witness, the jury is as much entitled to know it, as it is where the defendant has testified as his own witness.

Moreover, as we emphasized earlier, this case does not involve a statement seized in violation of the Constitution (see e.g. *State* v. *Davis*, 67 N.J. 222, 337 A.2d 33 [1975]), it involves rather the question whether in light of the circumstances under which the statement was obtained it is fair and just to use it in the manner in which it was used here. And that, in turn, involves the issue whether the agreement conferred such extraordinarily broad "use" immunity. If we are correct and it is not read to do so, then it is plainly immaterial that the evidence was used to rebut the alibi testimony of a defense witness rather than the defendant.

C. The Admission of the Post-Agreement Admissions Made by Appellant, if Found to be Error, is Harmless

We submit that even if the post-agreement statements were improperly admitted, the error was harmless in light of the properly admitted statements and the other

evidence of appellant's guilt. We proceed to review that evidence.

In the direct case, both D.E.A. agents DiGravio and Falvey testified concerning appellant's statements made prior to the alleged "promise" made to appellant. Both testified that appellant stated that he had observed Rudish's arrest on July 16 (148, 226, 227). No objection was made to this testimony. Further, Rudish testified that when appellant approached him after his arrest, appellant advised Rudish that he had observed Rudish's arrest from the parking lot (52).

Similarly, prior to the alleged "promise" made to appellant by Agent DiGravio, appellant told the agents that he was establishing an alibi defense. Agent Falvey testified to this admission during the direct case without objection (226, 227). Moreover, Rudish testified that appellant told him that he was considering a false alibi defense (53, 98). By contrast the three additional admissions offered into evidence in rebuttal were essentially cumulative. The admission that appellant was in the parking lot on July 16, 1974 where he observed Rudish's arrest and that he considered using a phony alibi witness were already before the jury in the testimony of the agents and appellant's "good friend" Rudish. Similarly appellant's admission that one Abrams was the source of the tablets added little to what was already an effective admission of appellant's participation in the transaction at issue.

Moreover, the other evidence adduced at trial was compelling. Appellant's accomplice, Jerome Rudish, testified as to the planning and carrying out of this narcotics transaction. His testimony was corroborated by the undercover and surveillance agents. Further, the use of appellant's automobile in this illicit transaction and subsequent false stolen car report filed by appellant provides

additional independent corroboration of appellant's guilt. Finally, appellant's own alibi witness testified that appellant had told him that Jerome Rudish was his "good friend", an admission adopted by defense counsel (356),[9] and that appellant had lent his car to Rudish, an admission wholly inconsistent with the stolen car report filed by appellant.

In sum, appellant's admissions made to Agents DiGravio, Falvey, and accomplice Rudish, which are concededly admissible, that he observed Rudish's arrest, that he falsely reported his car stolen and that he would establish a false alibi defense, considered together with the other evidence, provided a compelling case to support appellant's conviction without regard to the questioned admissions. Their admission was harmless beyond a reasonable doubt.[10] See, *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

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[9] "Let's take a look at Jerome Rudish," he told the jury, "a life long friend of the accused" (356).

[10] Our view that the admission of these additional admissions is supported by the fact that during its deliberations the jury requested the testimony of Agents DiGravio and Falvey regarding the questioning of appellant at the time of his arrest, but specifically did not want to hear the testimony of DiGravio regarding the additional statements made after the "promise" (Trial minutes, April 15, 1975, pg. 5).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 28, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney.

GARY A. WOODFIELD,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

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COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

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LYDIA FERNA

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